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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
SIXTH APPELLATE DISTRICT

CLINIMETRICS RESEARCH ASSOCIATES, INC., H025955

Plaintiff, Cross-Defendant, and  
Respondent,

(Santa Clara County  
Superior Court  
No. CV 788740)

v.

LYDIA P. BOOKER,

Defendant, Cross-Complainant  
and Appellant.

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Plaintiff Clinimetrics Research Associates, Inc. (Clinimetrics) sued its former employee defendant Lydia P. Booker (Booker) after she left Clinimetrics's employ and independently contracted to provide services to the Clinimetrics client that she had previously provided services to on behalf of Clinimetrics.

Clinimetrics alleged numerous causes of action including breach of the duty of loyalty, interference with contract and fraud and sought a constructive trust.

Booker cross-complained for declaratory relief invalidating a noncompetition clause and damages for unfair competition. Clinimetrics moved for summary judgment or summary adjudication on both its complaint and Booker's cross-complaint. The trial court granted Clinimetrics summary judgment on Booker's

cross-complaint and summary adjudication of Clinimetrics's causes of action for breach of the duty of loyalty, interference with contract and fraud.<sup>1</sup> It also ruled that Clinimetrics was entitled to a constructive trust on all of Booker's past and future revenue from the Clinimetrics client with whom she had contracted.

Booker appeals. She asserts that Clinimetrics did not establish by undisputed evidence that it was entitled to judgment on any of these causes of action or that it was entitled to a constructive trust on all of her revenue from the Clinimetrics client. She also challenges the court's grant of summary judgment to Clinimetrics on her cross-complaint. We conclude that Clinimetrics was not entitled to summary adjudication of any of the causes of action in its complaint but that it was entitled to summary judgment on the cross-complaint. Therefore, we reverse the judgment and remand for further proceedings.

### **I. The Complaint's Allegations**

Clinimetrics alleged causes of action for breach of contract, breach of the implied covenant of good faith and fair dealing, breach of the duty of loyalty, fraud and interference with contract. The complaint also alleged that Clinimetrics was entitled to a constructive trust.

Booker became employed by Clinimetrics in 1995. In 1997, Clinimetrics entered into a contract to provide clinical research associates to CV Therapeutics (CVT). Clinimetrics assigned Booker to work at CVT as a clinical research associate in 1998. Clinimetrics alleged that Booker "engaged in discussions and negotiations with CVT to provide the same services directly to CVT in an effort to end Clinimetrics' contract with CVT . . . ." Booker then resigned from

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<sup>1</sup> Clinimetrics also obtained summary adjudication of its cause of action for breach of the implied covenant of good faith and fair dealing, but it does not defend this ruling on appeal.

Clinimetrics so that she could “enter into a contract with CVT to provide substantially the same services that were being provided to CVT by defendant as an employee of Clinimetrics.”

Clinimetrics premised its breach of the duty of loyalty cause of action on Labor Code sections 2860, 2861, 2862 and 2863. Clinimetrics alleged that Booker had breached her duty of loyalty to it by (1) “engaging in discussions and negotiations with CVT to provide the same or substantially similar services directly to CVT while still employed by Clinimetrics;” (2) “terminating her contract with Clinimetrics for the purpose of and/or with the intent to enter into a contract with CVT to provide substantially the same services that were being provided to CVT by defendant as an employee of Clinimetrics;” (3) “failing to inform Clinimetrics, while employed by Clinimetrics, of any discussion she had with CVT relating to the status of her continued assignment at CVT or any information pertaining to an express interest, desire or intent to terminate her relationship with Clinimetrics and pursue a direct relationship with CVT;” and (4) utilizing Clinimetrics’s “proprietary information” for her own benefit.

The fraud cause of action alleged that, when Booker was hired by Clinimetrics (in 1995) and when it assigned her to work for CVT (in 1998), she represented to Clinimetrics that she would be loyal to Clinimetrics. Clinimetrics alleged that these affirmative representations were false, and instead Booker intended to be disloyal to Clinimetrics and “to attempt to usurp business opportunities for herself which belong to Clinimetrics . . . .” Clinimetrics alleged that it had relied on these representations to its detriment.

The interference with contract cause of action alleged that, after Booker resigned from Clinimetrics, she convinced CVT to terminate its contractual relationship with Clinimetrics, and CVT did so.

Clinimetrics alleged that it was entitled to a constructive trust as to “all fees paid [to Booker] for her service and/or work for CVT” because Booker had violated her “confidential relationship” with Clinimetrics by breaching her duty of loyalty to Clinimetrics.

## **II. Booker’s Answer and Cross-Complaint**

Booker filed an answer that generally denied the allegations of the complaint and specifically denied that she had caused Clinimetrics any damages.

She also filed a cross-complaint in which she (1) sought declaratory relief declaring unenforceable the noncompetition clause in her employment agreement with Clinimetrics and (2) sought damages or restitution for Clinimetrics’s unfair competition with her.<sup>2</sup>

## **III. Clinimetrics’s Motion**

Clinimetrics filed a motion for summary judgment or summary adjudication as to both the complaint and the cross-complaint. It claimed that there were no triable issues of fact, and it was entitled to judgment on all causes of action.

Clinimetrics asserted in its motion that it was entitled to prevail on its causes of action because it was undisputed that (1) Clinimetrics had a contract with CVT to provide the services that Booker provided to CVT as a Clinimetrics employee; (2) “[w]hile still an employee of Clinimetrics, Booker entered into

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<sup>2</sup> Booker also alleged causes of action for interference with contract and interference with prospective economic advantage, but Clinimetrics’s demurrer to these causes of action was sustained. Although she was granted leave to amend, Booker chose not to do so, and these causes of action are therefore not at issue on appeal.

discussions with CVT to provide her same services on the same project directly to CVT, without discussing such information [with Clinimetrics];” (3) “Booker intentionally concealed from Clinimetrics her negotiations with CVT to work directly for CVT;” (4) when Booker left Clinimetrics for CVT, CVT terminated its business with Clinimetrics; and (5) “[h]ad Clinimetrics known the concealed information, Clinimetrics could have engaged in actions designed to minimize its losses or even save the relationship [with CVT].” Clinimetrics argued in its motion that it was entitled to a constructive trust “to recoup the profits that should have been paid to Clinimetrics but for Booker’s wrongful conduct.”

As to Booker’s cross-complaint, Clinimetrics maintained that it was entitled to prevail because it was undisputed that (1) declaratory relief was unavailable as Clinimetrics did not seek to enforce the noncompetition clause and (2) Clinimetrics had not engaged in unfair competition but had only lawfully pursued its rights with regard to Booker’s breach of her duty of loyalty.

Clinimetrics supported its motion with the following evidence. First of all, several facts were undisputed because Booker had failed to respond to requests for admissions, and the court had deemed the requested admissions admitted. These facts were: (1) Booker “engaged in negotiations, discussions and/or communications with CVT . . . regarding working for CVT directly while [Booker was] still employed by Clinimetrics;” (2) Booker terminated her employment with Clinimetrics “for the purpose of and/or the intent to enter into a contract with CVT to provide substantially the same services that were being provided to CVT by [Booker] as an employee of Clinimetrics;” and (3) Booker “informed CVT of the instant lawsuit.”

It was also undisputed that there was a contract between Clinimetrics and CVT that was effective for one-year renewable periods beginning in October

1997.<sup>3</sup> Booker became a Clinimetrics employee in 1995. Booker was assigned by Clinimetrics to work for CVT under the CVT-Clinimetrics contract in August 1998. Booker was aware that Clinimetrics had a contract with CVT to provide the services that she was providing to CVT. In September 1999, unbeknownst to Booker, CVT began to consider recruiting her as an employee.

On or about November 30, 1999, Rafael Escandon, Booker's CVT supervisor, emailed to Booker a copy of a letter that CVT had sent to Clinimetrics. When Booker read this letter, she learned for the first time that CVT "was displeased" with Clinimetrics. Shortly after she saw this letter, Escandon "called [Booker] into his office to meet with him." During a meeting that lasted no more than a few minutes, Escandon "praised [Booker's] work and said that he and other CVT staff enjoyed working with [Booker] and were pleased with [Booker's] work. [¶] He stated that if [Booker] were interested in leaving Clinimetrics, CVT would be very pleased to hire [her]." Booker thanked Escandon for his compliments "and informed him that I would consider it or think about it." Escandon made no comments during this meeting about Clinimetrics, and Booker saw no need to tell Clinimetrics about her brief conversation with Escandon.

In December 1999, Linda Dowdle, Booker's Clinimetrics manager, informed Booker that Booker was going to be removed from the CVT project after the holidays. Booker thereafter received a voicemail message from another Clinimetrics manager informing her that "all Clinimetrics personnel would be transferred off of the CVT project effective January 14th, 2000."

On or about January 10, 2000, Booker initiated a brief discussion with Escandon about "working with CVT as an independent contractor." The

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<sup>3</sup> This contract provided that CVT would pay Clinimetrics a fee of one-third of the annual salary of any Clinimetrics employee that CVT hired without Clinimetrics's approval.

discussion lasted just a few minutes. She told Escandon that she would “be very interested in working for [CVT] as an independent consultant.” Escandon replied “Great” and said he would prepare a contract. He proposed an hourly rate, and Booker accepted the proposal. It was understood that Booker would be performing the same duties as an independent contractor that she was performing for CVT as a Clinimetrics employee.

On January 10 or 11, 2000, Booker had a conversation with Clinimetrics vice president James Wilson regarding her upcoming transfer off of the CVT project. He did not offer her the option of remaining at CVT.

On January 10, 11 or 12, 2000, Booker had a conversation with Clinimetrics manager Pamela Wilson. Pamela Wilson told Booker that Booker was going to be transferred to a project at Roche. Although Pamela Wilson emphasized the “urgent need” that Clinimetrics had to place Booker at Roche, she also asserted that Booker had “the option to stay” at CVT. Nevertheless, Booker did not feel comfortable asking Clinimetrics to allow her to stay at CVT, especially since Clinimetrics was planning to remove all of its personnel from CVT. Booker asked for two days to think about it. In fact, Booker had already decided to resign from Clinimetrics. However, she was not yet ready to inform Clinimetrics because she wanted to verify her legal rights and find out whether it would be “wrong” for her to go to work as an independent contractor for CVT. On January 13, 2000, Booker submitted her resignation in writing to James Wilson effective February 14, 2000. On January 13 or 14, 2000, Booker again spoke with Dowdle by telephone. Booker told Dowdle that she was resigning from Clinimetrics and going to work for CVT as an independent contractor.

Booker subsequently informed Escandon that she had resigned from Clinimetrics and could start working for CVT after February 14, 2000, when her obligations to Clinimetrics would end. On February 15, 2000, Booker became an

independent contractor for CVT doing the same work for CVT that she had done for CVT as a Clinimetrics employee. She continued to work 24 hours a week (as she had for Clinimetrics) and has remained a contractor for CVT ever since. She was paid \$85 per hour by CVT. CVT had paid Clinimetrics \$75 per hour for Booker's services.<sup>4</sup> Booker was paid \$42 or \$45 per hour by Clinimetrics for her services.<sup>5</sup> The CVT project she is working on is expected to last until 2005.

Sometime in late February 2000, CVT ceased to pay Clinimetrics's invoices for work performed by Clinimetrics employees other than Booker. CVT informed Clinimetrics that it "had no intention of conducting any further business with Clinimetrics." CVT has done "little or no business" with Clinimetrics since then.

Clinimetrics also submitted James Wilson's declaration in support of its motion. James Wilson declared that Booker had never informed Clinimetrics that CVT was dissatisfied with Clinimetrics or was interested in hiring her directly or that she was dissatisfied with Clinimetrics or was interested in working directly for CVT. However, "in about Fall 1999," CVT informed Clinimetrics that "CVT wished to end Clinimetrics' provision of services on certain projects, except for the services of Booker." Had Booker informed Clinimetrics that she and CVT were discussing her working directly for CVT, Wilson "would have become involved in either attempts to resolve the issues and save the relationships among the parties to preserve Clinimetrics' business, or I would have negotiated an exit strategy with both CVT and Booker which would have mitigated Clinimetrics' losses due to Booker's conduct."

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<sup>4</sup> Clinimetrics submitted evidence that it has since raised its rates to at least \$95 per hour.

<sup>5</sup> There is no evidence in the record that Booker received any health or other benefits during her employment with Clinimetrics.



#### **IV. Booker's Opposition**

Booker opposed Clinimetrics's motion and submitted evidence in support of her opposition.

First, she submitted the November 30 letter from CVT to Clinimetrics. This letter stated that CVT would no longer require the services of Clinimetrics employees other than Booker and Ana Maria Panaitoiu after January 14, 2000. Booker declared that she was not involved with and had no knowledge at the time of CVT's motivation for this decision.

Second, Booker declared that she had not intended to go to work directly for CVT until she was told by Clinimetrics in December 1999 that it would be transferring her away from CVT to Roche. Since she wanted to remain at CVT, she decided in mid-January 2000 to accept Escandon's previous offer. Booker did not negotiate a pay rate with Escandon but simply accepted his offer of \$85 per hour.

Third, CVT's failure to pay Clinimetrics invoices had nothing to do with Booker but simply was related to Clinimetrics's overbilling and questionable billing practices. CVT stopped doing business with Clinimetrics not because of Booker but because of concerns about the services that Clinimetrics had provided through other Clinimetrics employees.

Fourth, the breach in the CVT-Clinimetrics relationship was initiated by Clinimetrics. On January 25, 2000, Clinimetrics sent a letter to CVT notifying CVT that Panaitoiu, the only remaining Clinimetrics employee at CVT other than Booker, was being reassigned and would no longer be working at CVT. The letter did not mention any replacement for Panaitoiu. CVT believed that this action showed that there was no longer any "good faith operating" between it and Clinimetrics. On March 1, 2000, CVT sent a letter to Clinimetrics notifying

Clinimetrics that CVT believed that Clinimetrics would be in breach of its contract with CVT if it did not replace Panaitoiu with a qualified person within 30 days. Clinimetrics did not respond to this letter.

Finally, Booker denied that she had ever expressly represented to Clinimetrics that she would be loyal to it.

### **V. Clinimetrics's Reply to Booker's Opposition**

Clinimetrics argued that “[b]y the time Booker told Clinimetrics of her secret activities, the relationship [between Clinimetrics and CVT] was not salvageable.” It also asserted that it was entitled to a constructive trust “to recoup the profits that should have been paid to Clinimetrics but for Booker’s wrongful conduct.”

### **VI. Hearing and Ruling**

At the hearing on the motion, Booker argued that Clinimetrics had failed to show causation. Clinimetrics relied primarily on the breach of the duty of loyalty cause of action to support its claim for damages and a constructive trust. The court never ruled on Clinimetrics’s evidentiary objections to Booker’s evidence.

The court granted Clinimetrics summary judgment on the cross-complaint and summary adjudication of Clinimetrics’s causes of action for breach of the duty of loyalty, fraud and interference with contract.<sup>6</sup> The court also granted summary

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<sup>6</sup> The court denied summary adjudication as to Clinimetrics’s contract cause of action but granted it as to Clinimetrics’s breach of the covenant of good faith and fair dealing cause of action. Clinimetrics does not defend the summary adjudication of the breach of the implied covenant cause of action, so it and the contract cause of action are not at issue in this appeal.

adjudication of Clinimetrics's request for a constructive trust. The court subsequently denied Booker's request for reconsideration.

Clinimetrics dismissed its contract cause of action. The court then entered judgment for Clinimetrics on its complaint and Booker's cross-complaint. The judgment stated that the court was "imposing a constructive trust on Booker, in favor of Clinimetrics, for all monies received by Booker from [CVT] from and after February 15, 2000. As of December 2001, said amount equaled at least \$149,770." The judgment also awarded Clinimetrics interest and costs. Booker filed a timely notice of appeal. Five months after the March 2003 entry of judgment, the court determined that the "total value of the judgment as of August 4, 2003 is \$414,768.99."

## **VII. Discussion**

### **A. Standard of Review**

"Appellate review of a ruling on a summary judgment or summary adjudication motion is de novo." (*Brassinga v. City of Mountain View* (1998) 66 Cal.App.4th 195, 210.) "The purpose of the law of summary judgment is to provide courts with a mechanism to cut through the parties' pleadings in order to determine whether, despite their allegations, trial is in fact necessary to resolve their dispute." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 843.)

"[S]ummary judgment law in this state no longer requires a plaintiff moving for summary judgment to disprove any defense asserted by the defendant as well as prove each element of his own cause of action." (*Aguilar* at p. 853.) "All that the plaintiff need do is to 'prove[] each element of the cause of action.'" (*Aguilar* at p. 853.) A plaintiff moving for summary judgment bears "the burden of persuasion" that there are no triable issues of material fact and that it is entitled to judgment as a matter of law. (*Aguilar* at p. 850.) The plaintiff also "bears an

initial burden of production to make a prima facie showing of the nonexistence of any triable issue of material fact; if he carries his burden of production, he causes a shift, and the [defendant] is then subjected to a burden of production of his own to make a prima facie showing of the existence of a triable issue of material fact.” (*Id.* at p. 850.) “A prima facie showing is one that is sufficient to support the position of the party in question.” (*Aguilar* at p. 851.)

“[H]ow the parties moving for, and opposing, summary judgment may each carry their burden of persuasion and/or production depends on *which* would bear *what* burden of proof at trial.” (*Aguilar* at p. 851, original emphasis.) “There is a triable issue of material fact if, and only if, the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof.” (*Id.* at p. 850.) “Thus, if a plaintiff who would bear the burden of proof by a preponderance of evidence at trial moves for summary judgment, he must present evidence that would require a reasonable trier of fact to find any underlying material fact more likely than not—otherwise, he would not be entitled to judgment as a matter of law, but would have to present his evidence to a trier of fact.” (*Aguilar* at p. 851.)

“On motion for summary judgment the pleadings define the issues; thus [i]n the absence of some request for amendment there is no occasion to inquire about possible issues not raised by the pleadings.” (*Metromedia, Inc. v. City of San Diego* (1980) 26 Cal.3d 848, 885, internal quotation marks omitted.) Consequently, a summary judgment or summary adjudication cannot be based on allegations that are not contained in the complaint. (*Ibid.*)

## **B. Fraud**

Clinimetrics alleged in its complaint that Booker was liable for fraud because she had represented when she was hired by Clinimetrics in 1995 and

when it assigned her to work for CVT in 1998 that she would be loyal to Clinimetrics. Clinimetrics alleged that these affirmative representations were false. However, Clinimetrics produced no evidence in support of its summary adjudication motion that Booker had made any such representations, and Booker produced evidence in opposition that she had made no such representations at any time.

Clinimetrics instead attempted to support its fraud cause of action by producing evidence in support of its summary adjudication motion that Booker was liable for fraud because she had *concealed* her 1999 and 2000 “negotiations” with CVT from Clinimetrics. Since Clinimetrics did not amend or seek to amend its complaint to substitute these allegations for the fraud allegations in the complaint, this evidence could not support Clinimetrics’s motion for summary adjudication of the fraud cause of action. (*Metromedia, Inc.* at p. 885.) Because Clinimetrics did not satisfy its burden of proving the fraud allegations in its complaint, Clinimetrics was not entitled to obtain summary adjudication of the fraud cause of action. The trial court erred in granting Clinimetrics summary adjudication of the fraud cause of action.

### **C. Interference With Contract**

“The elements which a plaintiff must plead to state the cause of action for intentional interference with contractual relations are (1) a valid contract between plaintiff and a third party; (2) defendant’s knowledge of this contract; (3) defendant’s intentional acts designed to induce a breach or disruption of the contractual relationship; (4) actual breach or disruption of the contractual relationship; and (5) resulting damage.” (*Pacific Gas & Electric Co. v. Bear Stearns & Co.* (1990) 50 Cal.3d 1118, 1126.) “[A] plaintiff, seeking to hold one liable for unjustifiably inducing another to breach a contract, must allege [and

prove] that the contract would otherwise have been performed, and that it was breached and abandoned by reason of the defendant's wrongful act *and that such act was the moving cause thereof . . .*" (*Dryden v. Tri-Valley Growers* (1977) 65 Cal.App.3d 990, 997, emphasis added.)

Here, Clinimetrics failed to establish that it was an undisputed fact that Booker's conduct *caused* the alleged disruption of Clinimetrics's contractual relationship with CVT. Clinimetrics alleged in its complaint that Booker was liable for interference with contract because, after Booker left Clinimetrics and went to work as an independent contractor for CVT, she convinced CVT to terminate its contractual relationship with Clinimetrics.<sup>7</sup> Clinimetrics relied upon the *chronological relationship* between Booker's conduct and the termination of the CVT-Clinimetrics contractual relationship to support an inference that there was also a *causal relationship*.

Booker, on the other hand, produced substantial evidence in response to Clinimetrics's motion that rebutted the notion that there was any causal relationship between her conduct and the breakdown of the CVT-Clinimetrics contractual relationship. In the fall of 1999, CVT started to become dissatisfied with Clinimetrics because it believed that Clinimetrics was overbilling it and otherwise using questionable billing practices. Without Booker's involvement or knowledge, CVT decided to minimize its relationship with Clinimetrics by reducing its Clinimetrics staffing to Booker and Panaitiou. Clinimetrics responded by notifying Booker that she would be transferred away from CVT and notifying CVT that Panaitiou would also be transferred away from CVT. After Booker left

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<sup>7</sup> Clinimetrics did not allege a cause of action for interference with prospective economic advantage, a broader tort that extends to lost economic advantage outside the scope of an existing contract. (*Korea Supply Co. v. Lockheed Martin Corp.* (2003) 29 Cal.4th 1134, 1157.)

Clinimetrics and Clinimetrics transferred Panaitiou away from CVT, Clinimetrics provided no replacement for Panaitiou even after CVT requested one. This evidence supported a conclusion that CVT stopped doing business with Clinimetrics not because of Booker but because of CVT's concerns about the services that Clinimetrics had provided through other Clinimetrics employees and Clinimetrics's refusal to provide the services that CVT required. James Wilson claimed that he could have "save[d]" the Clinimetrics-CVT relationship if only he had known during those few days in mid-January between Booker's conversation with Escandon and her resignation from Clinimetrics that Booker and CVT were negotiating for Booker to work directly for CVT. However, Booker's evidence was more than sufficient to support a finding that Clinimetrics could not have salvaged, and would not have been able to salvage, a relationship with CVT given its prior conduct and its subsequent conduct in regard to CVT.

Because Booker's evidence raised a triable issue of fact regarding causation, the trial court erred in summarily adjudicating the interference with contract cause of action.

#### **D. Duty of Loyalty**

Clinimetrics premised its breach of the duty of loyalty cause of action on Labor Code sections 2860, 2861 and 2863.<sup>8</sup>

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<sup>8</sup> The complaint also mentioned Labor Code section 2862, but Clinimetrics does not rely upon that section. Labor Code section 2862 provides that "[a]n employee who receives anything on account of his employer, in any capacity other than that of a mere servant, is not bound to deliver it to the employer until demanded, and is not at liberty to send it to the employer from a distance, without demand, in any mode involving greater risk than its retention by the employee himself." (Lab. Code, § 2862.)

These Labor Code sections provide as follows. “Everything which an employee acquires by virtue of his employment, except the compensation which is due to him from his employer, belongs to the employer, whether acquired lawfully or unlawfully, or during or after the expiration of the term of his employment.” (Lab. Code, § 2860.) “An employee shall, on demand, render to his employer just accounts of all his transactions in the course of his service, as often as is reasonable, and shall, without demand, give prompt notice to his employer of everything which he receives for the account of the employer.” (Lab. Code, § 2861.) “An employee who has any business to transact on his own account, similar to that intrusted to him by his employer, shall always give the preference to the business of the employer.” (Lab. Code, § 2863.)

Clinimetrics alleged that Booker had breached her duty of loyalty to it by (1) “engaging in discussions and negotiations with CVT to provide the same or substantially similar services directly to CVT while still employed by Clinimetrics;” (2) “terminating her contract with Clinimetrics for the purpose of and/or with the intent to enter into contract with CVT to provide substantially the same services that were being provided to CVT by defendant as an employee of Clinimetrics;” (3) “failing to inform Clinimetrics, while employed by Clinimetrics, of any discussion she had with CVT relating to the status of her continued assignment at CVT or any information pertaining to an express interest, desire or intent to terminate her relationship with Clinimetrics and pursue a direct relationship with CVT;” and (4) utilizing Clinimetrics’s “proprietary information” for her own benefit.

Clinimetrics never produced any evidence that Booker had utilized its “proprietary information,” so that allegation could not form the basis for Booker’s liability for breach of the duty of loyalty. Nor could Clinimetrics establish liability based on Booker’s termination of her contract with Clinimetrics since neither



Booker's at-will contract with Clinimetrics nor the Labor Code required Booker to remain employed by Clinimetrics. Consequently, we need only concern ourselves with whether Clinimetrics was entitled to prevail on its breach of the duty of loyalty cause of action based on (1) Booker's "discussions and negotiations with CVT" during her Clinimetrics employment and (2) her failure to inform Clinimetrics of those discussions.

Clinimetrics relies on evidence that Booker had two brief discussions with Escandon, her CVT supervisor, during her Clinimetrics employment. During the initial December discussion, Escandon praised Booker's work and told her that CVT would be happy to hire her if she left Clinimetrics's employ. Escandon made no comments about Clinimetrics or the relationship between CVT and Clinimetrics. We can find nothing in Labor Code sections 2860, 2861 or 2863 to support a conclusion that Booker violated any duty to Clinimetrics by receiving Escandon's praise or by failing to inform Clinimetrics of Escandon's brief comments. Clinimetrics produced no evidence that Escandon disclosed any information to Booker during this brief conversation that would have been of value to Clinimetrics, and the gist of his statements was simply that he was pleased with Booker's work. Hence, this discussion could not form the basis for a finding that Booker breached her duty of loyalty to Clinimetrics.

The second discussion between Escandon and Booker occurred in mid-January. At that point, Clinimetrics had already informed Booker that she was going to be removed from the CVT project shortly and transferred to a project at Roche and that all Clinimetrics personnel were going to be transferred away from CVT as of January 14. Because she wanted to keep working at CVT, Booker approached Escandon to see if she could remain at CVT "working with CVT as an independent contractor." Escandon enthusiastically agreed. *After* this conversation Booker talked to Pamela Wilson, and Pamela Wilson suggested that

it was *possible* that Booker could stay at CVT. At around the same time, Booker spoke with James Wilson, who was apparently superior to Pamela Wilson, and James Wilson did not offer her the option of remaining at CVT. Consequently, Booker believed that Clinimetrics would be removing her from CVT, and her only option for remaining at CVT was to resign from Clinimetrics and become an independent contractor for CVT. Booker's discussion with Escandon and her discussions with the Wilsons occurred within a couple of days of each other. Booker submitted her resignation to Clinimetrics no more than a few days after her discussion with Escandon and expressly informed Clinimetrics that she was going to work for CVT as an independent contractor.

Clinimetrics relies heavily on two wrongful termination cases in which employees were found to have breached their duties of loyalty to their employers. (*Fowler v. Varian Associates, Inc.* (1987) 196 Cal.App.3d 34; *Stokes v. Dole Nut Co.* (1995) 41 Cal.App.4th 285.) While an employee may be terminated for a breach of the duty of loyalty that causes no damage to the employer, Clinimetrics could not obtain summary adjudication of its *tort cause of action* against Booker without establishing that Booker's breach of her duty of loyalty *caused the damages that Clinimetrics claimed*. (See *Fowler* at p. 42 and *Stokes* at pp. 294-295.) Neither *Fowler* nor *Stokes* involved the *liability* of an employee to an employer for a breach of the duty of loyalty. Assuming *arguendo* that Booker breached her duty of loyalty to Clinimetrics by initiating this second discussion with Escandon, Clinimetrics failed to present evidence that would have required a reasonable trier of fact to find that Booker's conduct likely *caused* the damages that Clinimetrics claimed.

Clinimetrics claimed that Booker's conduct led to its loss of the CVT business and its loss of the revenue that it was reaping from Booker's work at CVT. Clinimetrics failed to prove, however, that either of these alleged losses

resulted from Booker's January discussion with Escandon. At that point, Clinimetrics had already decided to remove its personnel, including Booker and Panaitiou, from CVT. While James Wilson claimed that he could have saved the CVT-Clinimetrics relationship if only he had known of Booker's January discussion with Escandon, the evidence did not support his claim. Booker told Clinimetrics that she was going to work for CVT as an independent contractor, which was the substance of her January discussion with Escandon, within a few days after the discussion occurred. Yet Clinimetrics did not contact CVT and attempt to repair the relationship but instead removed Panaitiou (its only remaining employee at CVT) and thereafter refused to even propose a replacement for her.

Clinimetrics simply failed to establish that Booker's January discussion with Escandon and her failure to inform Clinimetrics of that discussion caused Clinimetrics to lose its business with CVT or to lose the revenues that it had previously reaped from Booker's work at CVT for Clinimetrics. The evidence reflected that the CVT-Clinimetrics relationship had already been disrupted and that Clinimetrics had embarked on a path that was destined to further disrupt that relationship. The fact that Clinimetrics was attempting to remove Booker from CVT and that Booker had no obligation to remain a Clinimetrics employee indicated that it was unlikely that Clinimetrics would continue to reap revenue from Booker working as a Clinimetrics employee at CVT. Had Booker simply resigned from Clinimetrics and pursued Escandon's earlier suggestion *after the termination of her Clinimetrics employment*, there would have been no breach of the duty of loyalty yet Clinimetrics still would have sustained the losses that it now claims resulted from Booker's conduct. The evidence produced by Clinimetrics simply failed to meet the burden that Clinimetrics bore of establishing that there were no triable issues of fact as to the causation of its

damages. It follows that Clinimetrics was not entitled to prevail on its breach of the duty of loyalty cause of action, and the trial court erred in granting summary adjudication of that cause of action.

### **E. Booker's Cross-Complaint**

Booker's cross-complaint alleged that she and Clinimetrics had a dispute about the enforceability of the noncompetition clause in her employment agreement with Clinimetrics and sought declaratory relief establishing that the noncompetition clause was unenforceable. Clinimetrics responded by producing evidence that it was not seeking to enforce the noncompetition clause against Booker and had removed it from all Clinimetrics employment contracts. Booker did not produce any evidence to the contrary.

Booker also alleged in her cross-complaint that she was entitled to damages or restitution under Business and Professions Code section 17200 for Clinimetrics's unfair competition with her. This cause of action was apparently a derivative of her contention that Clinimetrics was attempting to enforce an unenforceable noncompetition clause. Since Clinimetrics established that it was not attempting to enforce that clause and Booker did not produce evidence to the contrary, the unfair competition cause of action also was doomed. Her unfair competition cause of action obviously could not be based on Clinimetrics's filing of this lawsuit. (*Rubin v. Green* (1993) 4 Cal.4th 1187, 1196-1204.)

Since Clinimetrics established that Booker could not succeed on either of the causes of action in her cross-complaint, the trial court did not err in granting summary judgment on the cross-complaint.

### **VIII. Disposition**

The judgment is reversed. The trial court is directed to vacate the judgment and vacate its order on Clinimetrics's motion. The court shall enter a new order granting Clinimetrics summary judgment on Booker's cross-complaint but denying Clinimetrics summary judgment or summary adjudication on its complaint and the causes of action therein. Booker shall recover her appellate costs.

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Mihara, J.

WE CONCUR:

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Bamattre-Manoukian, Acting P.J.

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McAdams, J.